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<b>P.G., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 13-589</b>
	)	<b>Issued: July 9, 2013</b>
<b>DEPARTMENT OF THE AIR FORCE, AIR</b>	)	
<b>FORCE COMMISSARY SERVICE,</b>	)	
<b>San Angelo, TX, Employer</b>	)	
	)	

Office of Solicitor, for the Director

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

On January 18, 2013 appellant filed a timely appeal from a July 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) that found an overpayment of compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

The issues are: (1) whether appellant received an overpayment in compensation in the amount of \$7,166.96 because he concurrently received Social Security Act (SSA) benefits for the period March 22, 2008 to June 2, 2012 while receiving FECA benefits; (2) whether OWCP properly denied waiver of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$70.00 every 28 days from appellant's continuing compensation.

<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case was previously before the Board. By decision dated August 24, 2001, the Board affirmed OWCP's December 21, 1999 decision finding that appellant's part-time cashier position fairly and reasonably represented his wage-earning capacity.<sup>2</sup>

On March 22, 2008 appellant turned 65 years of age and began receiving social security retirement benefits. The record includes OWCP-1032 forms signed by appellant on March 14, 2009 covering the period 15 months prior indicating that he was not receiving SSA benefits or payments. On OWCP-1032 forms signed February 23, 2010, February 24, 2011 and February 20, 2012, appellant stated that he started receiving benefits from SSA when he turned 65.

In March 2010, OWCP developed the issue of whether appellant was receiving dual benefits from FECA and SSA. On April 12, 2012 SSA provided information regarding receipt of appellant's SSA benefits with and without federal retirement (FERS) benefits from December 2007 through December 2011.

In a June 14, 2012 FERS offset calculation worksheet, OWCP calculated the amount of overpayment for the period March 22 through November 30, 2008. It took the appropriate FERS offset amount for the affected period and divided it by 28 days and then multiplied it by the daily amount of \$4.256 by the number of days in that period. For the period March 22 through November 30, 2008, the 28-day FERS offset amount of \$119.17 was divided by 28 ( $119.17/28 = 4.256$ ), then the daily amount, \$4.256, was multiplied by the number of days in that period, 254 ( $4.256 \times 254 = 1081.04$ ) for an overpayment amount of \$1,081.04 for that period. The same formula was applied for the periods December 1, 2008 through November 30, 2009, December 1, 2009 through November 30, 2010, December 1, 2010 through November 30, 2011 and December 1, 2011 through June 2, 2012 for an overpayment amount of \$1,636.48, \$1,636.48, \$1,636.48 and \$1,176.48, respectively. The total overpayment for the period March 22, 2008 through June 2, 2012 equaled \$7,166.96.

On June 22, 2012 OWCP issued a preliminary finding that a \$7,166.96 overpayment of compensation had been created. It found that the overpayment occurred because that portion of appellant's SSA benefits received from March 22, 2008 through June 2, 2012 based on credits earned by an employee covered under FERS was a prohibited dual benefit. OWCP found appellant without fault. It requested that appellant complete an overpayment recovery questionnaire and provide additional financial information as well as select any appeal rights. Appellant did not respond.

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<sup>2</sup> Docket No. 00-1451 (issued August 24, 2001). The record reflects that on August 10 and November 20, 1989 appellant, then a 46-year-old meat cutter, filed a claim attributing his back and asthma conditions to factors of his employment. He alleged that on November 11, 1988 stocking and unwrapping cases of meat and the cold temperatures in the freezer caused his back and asthma conditions. Appellant stopped working on July 29, 1989 and did not return. OWCP accepted the conditions of extrinsic asthma and sprain of the lumbosacral joint and paid appropriate benefits. It eventually retained appellant on its periodic compensation rolls.

By decision dated July 24, 2012, OWCP finalized the overpayment decision and determined that appellant had received an overpayment in the amount of \$7,166.98 for the period March 22, 2008 to June 2, 2012 as he received a prohibited dual benefit of compensation. It found that he was without fault in the creation of the overpayment but that it was not subject to waiver as he did not respond to the June 22, 2012 preliminary determination or complete an overpayment questionnaire. The recovery rate of the overpayment was set at a rate of \$70.00 each compensation period.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup>

Section 8116(d) of FECA requires that compensation benefits be reduced by the portion of SSA benefits based on age or death that are attributable to federal service and that, if an employee receives SSA benefits based on federal service, his or her compensation benefits shall be reduced by the amount of SSA benefits to his or her federal service.<sup>4</sup>

OWCP procedures provide that, while SSA benefits are payable concurrently with FECA benefits, the following restrictions apply: in disability cases, FECA benefits will be reduced by SSA benefits paid on the basis of age and attributable to the employee's federal service.<sup>5</sup> The offset of FECA benefits by SSA benefits attributable to employment under FERS is calculated as follows: where a claimant has received SSA benefits, OWCP will obtain information from SSA on the amount of the claimant's benefits beginning with the date of eligibility to FECA benefits. SSA will provide the actual amount of SSA benefits received by the claimant/beneficiary. SSA will also provide a hypothetical SSA benefit computed without the FERS covered earnings. OWCP will then deduct the hypothetical benefit from the actual benefit to determine the amount of benefits which are attributable to federal service and that amount will be deducted from FECA benefits to obtain the amount of compensation payable.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

Appellant received FECA wage-loss compensation and received SSA benefits from March 22, 2008 to June 2, 2012. The portion of the SSA benefits he earned as a federal employee as part of his FERS retirement package, and the receipt of benefits under FECA and federal retirement benefits concurrently is a prohibited dual benefit.<sup>7</sup> The SSA notified OWCP

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at 8116(d). See *G.B.*, Docket No. 11-1568 (issued February 15, 2012); see also *Janet K. George (Angelos George)*, 54 ECAB 201 (2002).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4(a) (February 1995); Chapter 2.1000.1.11(b) (February 1995); see also *R.C.*, Docket No. 09-2131 (issued April 2, 2010).

<sup>6</sup> FECA Bulletin No. 97-9 (issued February 3, 1997).

<sup>7</sup> *Id.*

of the applicable SSA rates for appellant and their effective dates. Based on these rates, OWCP determined the prohibited dual benefit appellant received from March 22, 2008 to June 2, 2012, created an overpayment of compensation in the amount of \$7,166.96.

On appeal, appellant argues that his due process rights were violated as the overpayment went back five years to 2008 and he was at the first step of the overpayment process. The fact that it may have taken OWCP sometime to discover that appellant was in receipt of a prohibited dual benefit does not preclude OWCP from recovering all or part of the overpayment. Appellant was properly notified of the issue at hand and given an opportunity to respond to the preliminary determination of overpaid benefits. He also submitted evidence on appeal. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision.<sup>8</sup>

The Board has reviewed OWCP's calculations of the dual benefits appellant received for the period March 22, 2008 to June 2, 2012. OWCP properly determined that he received dual benefits totaling \$7,166.96 for this period, thus creating an overpayment in compensation in that amount.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.<sup>9</sup> Waiver of an overpayment is not permitted unless the claimant is without fault in creating the overpayment.<sup>10</sup>

Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the beneficiary's assets do not exceed a specified amount as determined by OWCP from data furnished by the Bureau of Labor Statistics. A higher amount is specified for a beneficiary with one or more dependents.<sup>11</sup> Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.<sup>12</sup> Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such

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<sup>8</sup> 20 C.F.R. § 501.2(c)(1).

<sup>9</sup> 5 U.S.C. § 8129.

<sup>10</sup> *Steven R. Cofrancesco*, 57 ECAB 662 (2006).

<sup>11</sup> 20 C.F.R. § 10.436.

<sup>12</sup> *Id.* at § 10.437(a).

payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>13</sup>

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was without fault in the creation of the overpayment, but denied waiver. It notified him that compensation for wage loss should have been adjusted on March 22, 2008 when he started receiving SSA benefits and asked him to submit financial information to support waiver in a June 22, 2012 letter. The Board notes, however, that appellant failed to submit such information, despite having 30 days to do so.

Section 10.438 of OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver and no further request for waiver shall be considered until the requested information is furnished.<sup>15</sup>

OWCP determined that appellant was without fault in the creation of the overpayment. The fact that he was without fault does not preclude OWCP from recovering all or part of the overpayment. Appellant did not submit a response to OWCP's preliminary determination or submit an overpayment recovery questionnaire. Therefore OWCP acted properly in refusing his request for waiver of recovery of the overpayment under the implementing federal regulations. Absent the submission of such information, it was precluded from evaluating his eligibility for waiver of the overpayment. The Board finds that OWCP did not abuse its discretion by issuing its July 24, 2012 final decision denying waiver of recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information will be used to determine the repayment schedule, if necessary.<sup>16</sup>

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<sup>13</sup> *Id.* at § 10.437(b).

<sup>14</sup> *Id.* at § 10.438(a); *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

<sup>15</sup> *Id.* at § 10.438(b).

<sup>16</sup> See *J.D.*, Docket No. 10-640 (issued December 17, 2010); *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

OWCP's implementing regulations provide that, if an overpayment of compensation has been made to an individual entitled to further payments and no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly directed recovery of the overpayment at the rate of \$70.00 from each continuing compensation payment.

Regarding the recovery of \$7,166.96 from appellant's continuing compensation, the Board notes that he did not provide any financial information which would assist OWCP in determining the amount to deduct from future compensation payments in order to recoup the overpayment. OWCP set the rate of recovery as \$70.00 from each continuing compensation payment until the benefit was paid in full. The Board finds that this was reasonable in the absence of any financial documentation proving otherwise.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$7,166.96. OWCP properly denied waiver and required recovery of the overpayment by deducting \$70.00 every 28 days from his continuing compensation payments.

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<sup>17</sup> 20 C.F.R. § 10.441(a).

<sup>18</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 24, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board